In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 595

DONALD JACKSON DE MOSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. pp. 18–30) is reported at 218 F. 2d 119.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1954 (Pet. p. 31) and a petition for rehearing was denied on January 19, 1955 (Pet. p. 32). The petition for a writ of certiorari was filed on February 14, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, under the Universal Military Training and Service Act, a registrant is entitled to a hearing by the Department of Justice on appeal when his local board has accepted his claim of conscientious objection and his appeal is from a denial of a ministerial exemption.

STATUTE AND REGULATION INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612; 65 Stat. 75, 86:

Section 6 (j) (50 U. S. C. App. 456 (j)):

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing,

> if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

32 C. F. R. [1954 Supp.] 1626.25 (a) (2) provides in pertinent part:

> *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

* * * * *

(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I–O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I–O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Eighth Circuit (Pet. p. 31), affirming his conviction by the District Court for the Southern District of Iowa for violation of the Universal Military Training and Service Act by reason of his refusal to be inducted into the armed forces. Petitioner had received a sentence of eighteen months' imprisonment (R. 65–66).

Petitioner's record with the Selective Service System shows that, in a classification questionnaire executed in November 1951, he indicated

that he had been a minister of Jehovah's Witnesses since April 5, 1941 (when he was less than nine years old) (R. 16); that his presence on the farm was necessary (R. 16–17); and that he was a conscientious objector (R. 17). He thought his classification should be IV–D (ministerial exemption). He subsequently filed the special form for conscientious objectors (R. 19–23) and on February 18, 1952, was classified I–O (conscientious objector) by his local board (R. 18).

On March 2, 1953, petitioner was given a hearing on his claim to IV–D exemption (R. 30–31). He was again classified I–O (R. 31).

By letter of March 13, 1953, petitioner requested that an appeal be taken from his I–O classification on the basis that he was entitled to a IV–D classification (ministerial exemption) (R. 32–34). On April 28, 1953, without prior reference of his case to the Department of Justice for investigation of his conscientious-objector claim, the appeal board classified him I–A by unanimous vote. (R. 38). The local board did likewise on May 7, 1953 (R. 13, 19).

Petitioner attempted to appeal further to the President but without success (R. 41–47). An application to his local board to reopen his classification was denied on June 5, 1953 (R. 49, 51). On that day, he was ordered to report for induction July 20, 1953 (R. 51), and on July 20, 1953, he refused to submit to induction (R. 56).

DISCUSSION

Petitioner, after being classified I–O (conscientious objector) by his local board, appealed his case to the selective service appeal board on the basis of an additional claim that he was entitled to a IV–D (minister) classification. The appeal board, without referring the case for a hearing by the Department of Justice, proceeded to consider the entire file *de novo* and rendered a final I–A classification. This procedure was in accord with current Selective Service regulations (32 C. F. R. [1954 Supp.] 1626.25 (a) (2), *supra*, pp. 3–4) promulgated June 18, 1952 (Ex. Ord. 10363, 17 F. R. 5456).

Petitioner contends that Section 6 (j) of the Universal Military Training and Service Act (50 U. S. C. App. 456 (j)) requires reference to the Department of Justice in every case where a conscientious-objector claim is involved on appeal, and that the current regulation (authorizing a different procedure where the local board classifies I–O in the first instance and an appeal is taken from that classification) is illegal to the extent that it is inconsistent with the Act. The trial court and the Court of Appeals for the Eighth Circuit sustained the validity of the regulation on the basis of a literal reading of the following language of Section 6 (j):

> * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall,

> if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. * * *

The court of appeals interpreted the language above to restrict the Department of Justice inquiry procedure to those cases where a conscientious objector claim *"is not sustained by the local board"* and an appeal has been taken from such rejection. This holding is in direct conflict with the holding of the Court of Appeals for the Ninth Circuit in *Sterrett* v. *United States,* 216 F. 2d 659, which read Section 6 (j) of the Act as requiring a Department of Justice reference in any appeal involving "the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector".

Since the filing of the instant petition, this Court, on March 28, 1955, granted certiorari and summarily reversed the decision of the Court of Appeals for the Eighth Circuit in *Bates* v. *United States,* 216 F. 2d 130, which on its facts involved a similar issue of a registrant who appealed from a I–O classification on the basis of a IV–D claim

and was given a I–A classification by the Presidential Appeal Board without a reference by the appeal board (which affirmed the I–O classification) to the Department of Justice for inquiry, hearing and recommendation. In its *per curiam* opinion this Court said (*Ibid.*, No. 450, O. T. 1954):

> Petitioner's claim to exemption as a conscientious objector has been denied by the National Appeal Board without his Selective Service file ever having been referred to the Department of Justice for inquiry, hearing, and recommendation. The procedure prescribed by Section 6 (j) of the Universal Military Training and Service Act, 62 Stat. 612, as amended, 50 U. S. C. App. Section 456 (j), has not been complied with, and the judgment of conviction is accordingly reversed.

We understand this holding to mean that whenever a Selective Service appeal involves a claim of conscientious objection, regardless of whether or not such claim has been sustained by the local board, the appeal board must, under Section 6 (j) of the Universal Military Training and Service Act *supra*, refer the registrant's file to the Department of Justice for inquiry, hearing, and recommendation prior to rendering a final classification. Thus the *Bates* decision has resolved the point of conflict between the *Sterrett* decision of the Ninth Circuit and the opinion of the

Eighth Circuit below in favor of the *Sterrett* decision.

The Government therefore concedes that the opinion below, which relies on the interpretation of Section 6 (j) of the Universal Military Training and Service Act, *supra,* expressed in 32 C. F. R. [1954 Supp.] 1626.25 (a) (2),[1] is in error to the extent that it holds that petitioner was not entitled to have his claim referred to the Department of Justice.

CONCLUSION

We therefore agree that the judgment below should be reversed.

SIMON E. SOBELOFF,
Solicitor General.

APRIL 1955.

[1] The Selective Service system informs us that they will recommend that the regulation pertaining to Selective Service appeals be amended to conform to the holding of this Court in the *Bates* decision.

U. S. GOVERNMENT PRINTING OFFICE: 1955

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Decisions Per Curiam.

No. 595. DE MOSS *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed on confession of error by the Government and on the authority of *Bates* v. *United States*, 348 U. S. 966. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 218 F. 2d 119.

No. 644. DAVIDSON *v.* UNITED STATES. On petition for